

*United States Court of Appeals
for the Second Circuit*



APPENDIX

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76-2065

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARTHUR RICHARD GATES,

Petitioner-Appellant,

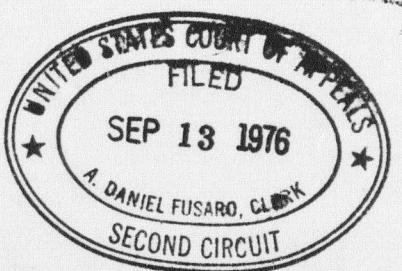
-against- : 76-2065

ROBERT J. HENDERSON, Superintendent, :
Auburn Correctional Facility, :
-----X

Respondent-Appellee.

APPELLANT'S APPENDIX

B
P/I
JESSE BERMAN
351 Broadway
New York, New York 10013
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Attorney for Petitioner-
Appellant



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STATES DISTRICT COURT

JUDGE CARTER

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Jury demand

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TITLE OF CASE

ex rel.
RICHARD GATES

VS.

W. T. J. HENDERSON, Superintendent
Auburn Correctional Facility,
Auburn, N.Y., 13021

For Plaintiff:
A. Richard Gates # 64437
135 State St.
Auburn, N.Y., 13021

CJA appointment: Jesse Berman, Esq.
351 R'way, NYC 10013

For Defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIVED BY
X	Clerk	SEP 7 1973	IFP.
Mailed ✓	Marshal		
Action:	Docket fee		
Habeas Corpus			
1221	Witness fees		
Oppose AC:	Depositions		

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JUDGE CARTER

73 W. 3865

DATE	PROCEEDINGS
Sept. - 73	Filed petition for writ of Habeas Corpus
Sept. - 73	Filed order permitting petitioner to proceed in forma pauperis. Duly
Oct. 1-73	Filed affidavit of Burton Herman in opposition to petitioner's application for a writ of habeas corpus.
Oct. 16-73	Filed petitioner's affidavit of traverse
Oct. 16-73	Filed notice of assignment of this action to Carter, J.
Mar-28-74	Filed C.J.A. copy #5 appointing Jesse Berman, Esq. as counsel for petitioner. - Carter, J.
04-24-75	Filed petitioner's memorandum of law in support of his pet. for W/H/C.
05-16-75	Filed defts memorandum of law in opposition to petition for W/H/C
5-28-75	Fld Opinion #4496.... Accordingly, the petition must be dismissed.. So Ordered...Carter, J mn
6-18-76	Fld Pltff's Notice of Appeal to USCA from order dtd 5-27-76.. mn on 6-21-76 to: L. J. Lefkowitz atty Gen and A. R. Gates.
6-17-76	Fld Order that Petitioner Gates is granted a Certificate of Probable Cause and that said Gates is permitted to prosecute the appeal in forma pauperis.. Carter, J.
7-2-76	Fld Notice Case Number 73 W. 3865 - 7-2-76
8-24-76	Fld CJA Form #2 appointing Jessie Berman as Counsel-dtd 7-6-76

OPINION OF THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK - May 27, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA ex rel. :
ARTHUR RICHARD GATES, :
Petitioner, :
- against - : 73 Civ. 3865.
ROBERT J. HENDERSON, Superintendent, :
Auburn Correctional Facility, :
Respondent. :
----- x

A P P E A R A N C E S:

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New York, New York 10047
by Burton Herman, Esq.
Ralph McMurry, Esq.
Assistant Attorney Generals
Attorney for Respondent

CARTER, District Judge

O P I N I O N

Arthur Richard Gates in his pro se petition seeks a writ of habeas corpus to free him from confinement to a term of 20-years-to-life imprisonment by the State of New York. Petitioner is in the custody of the respondent pursuant to a judgment of the County Court, Rockland County, New York (Silberman, J.), rendered February 14, 1967 convicting him, after trial by jury, of murder in the first degree.

Petitioner's conviction was affirmed by the Appellate Division, Second Department, 29 App. Div. 2d 843, 288 N.Y.S. 2d 862 (1968) without opinion; and by the Court of Appeals of the State of New York with opinion at 24 N.Y. 2d 666, 249 N.E. 2d 450, 301 N.Y.S. 2d 597 (1969). Gates' subsequent application for a writ of error coram nobis was denied, People v. Gates, 61 Misc. 2d 250, 305 N.Y.S. 2d 583 (County Court, Rockland County, 1969). The denial of the writ was affirmed by the Appellate Division, Second Department, 36 App. Div. 2d 761, 319 N.Y.S. 2d 569 (1971).

Petitioner asserts that his conviction is constitutionally defective because his palmprints were taken in violation of his rights under the Fourth and Fourteenth Amendments. Petitioner was arrested

shortly after the crime was committed. His palmprints were taken by the police soon thereafter and were used at trial against him. It is petitioner's position that probable cause for his arrest did not exist, that the palmprints are therefore "fruits" of an unlawful arrest, and that their admission into evidence violated his rights under the Fourth and Fourteenth Amendments.

See Davis V. Mississippi, 394 U.S. 721 (1969).

1 / Gates also asserts in his petition that his conviction was not supported by the weight of the evidence. Appointed counsel did not pursue this point and it is deemed waived. In any event, the sufficiency of evidence to support a criminal conviction is not a question of constitutional magnitude, but one of state law. United States ex rel. Griffin v. Martin, 409 F. 2d 1300, 1302 (2d Cir. 1969). See also United States ex rel. Griffin v. Vincent, 359 F. Supp. 1072, 1077 (S.D. N.Y. 1973).

2 / The Davis case, holding that fingerprint evidence is "subject to the proscriptions of the Fourth and Fourteenth Amendments" (394 U.S. at 723-24) (footnote omitted), was decided after petitioner's trial, but before the decision of the New York Court of Appeals. Davis did not enunciate a new doctrine, but merely extended the exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 655 (1961) to fingerprint evidence. As Justice Brennan, writing for the Court, expressed it: "Fingerprint evidence is no exception to this comprehensive rule." Davis v. Mississippi, supra, 394 U.S. at 724. The Davis decision, therefore, described an existing rule of law. Thus, there is no issue here of applying a new rule retroactively.

There is no dispute that defense counsel failed to make a suppression motion prior to trial. The issue presented to this court is whether defendant made an objection at trial sufficient to preserve the question of the admissibility of the palmprints for appellate or habeas review.

State Court Proceedings

The claims Gates asserts in this court, on petition for habeas corpus relief, were voiced in the Court of Appeals and specifically rejected. The Court of Appeals, per Judge Fuld, held that petitioner had not raised his claims below in a timely fashion and had therefore lost them:

"[T]he fact is that Gates failed to challenge the admissibility of his fingerprints on the ground that they were the fruit of an unlawful arrest either by pretrial motion to suppress --as mandated by our practice (Code Crim. Proc. §813-c)--or by objection at the trial to their receipt. This being so, it follows that the question is not preserved for our review upon appeal from the conviction. (See People v. Friola, 11 N.Y. 2d 157, 227 N.Y.S. 2d 423, 182 N.E. 2d 100.)"
People v. Gates, 24 N.Y. 2d 666, 670, 249 N.E. 2d 450, 452, 301 N.Y.S. 2d 597, 601 (1969) (footnote omitted).

The New York Code of Criminal Procedure, in force at the time of petitioner's trial, provided that:

"A person claiming to be aggrieved by an unlawful search and seizure ... may move for the return of such property or for the suppression of its use as evidence."

New York Code of Criminal Procedure
§813-c.

The Code also provided, in Section 813-d that:

"1. The motion shall be made with reasonable diligence prior to the commencement of ... trial ... except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial."

For failure to comply with these rules section 813-d further provided:

"4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained."

On application for a writ of error coram nobis, Judge John A. Gallucci noted:

"It is undisputed that the objections now sought to be raised by the defendant were not asserted by him at the time of trial by means of statutory procedure, i.e., motions to suppress (Sections 813-c to i, inclusive, Code of Criminal Procedure), by objections during the conduct of the trial itself, or by motions in arrest of judgment or for a new trial. It was not until argument before the Court of Appeals on February 27, 1969, two years after defendant's conviction, that he, for the first time, raised the issue of alleged violation of his Federal constitutional rights and which he now claims requires that his judgment of conviction be vacated. The Court of Appeals on May 14, 1969, specifically noted both the substantive applicability of defendant's assertions (citing *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed. 2d 676, decided April 22, 1969), as well as his failure to have preserved such issues for its review, and affirmed the judgment of conviction." People v. Gates, supra, 61 Misc. 2d at 252, 305 N.Y.S. 2d at 585-86).

Judge Gallucci concluded that failure to raise the objections in a timely fashion was a bar to state post-conviction relief. In affirming, the Appellate Division, Second Department said:

"Appellant never raised his Fourth Amendment claim in the trial court-- either by motion to suppress or objection upon the trial to receipt of the evidence."

People v. Gates, supra, 36 App. Div. 2d at 761, 319 N.Y.S. 2d at 570.

The court agreed that failure to preserve the issue for appeal forfeited any right Gates might have had to test the issue in a post-conviction proceeding.

Discussion

Petitioner asserts that proper objection was made at trial to the admission of his palmprints into evidence. He cites a portion of the transcript in which his counsel, Thomas Newman, stated his objection:

"[W]e raise objection not to the fact that they are or not his prints but to the introduction of those prints on the basis that this man's constitutional rights both under the State and Federal constitution have been violated by the taking of these prints and as such we object to them."

and the court responded:

"Your objection is then on constitutional grounds to the mere fact of the taking of the prints?"

The dialogue continued:

MR. NEWMAN: Yes, sir.

THE COURT: As such?

MR. NEWMAN: Right, sir.

THE COURT: I will overrule that objection.

MR. NEWMAN: Exception.
Transcript at 535-36.

Gates' position in this court is that proper objection was made at trial and that failure to object prior to trial should be excused under the second exception of §813-d because:

"It was not until the commencement of trial that counsel learned that the police may not have had probable cause for the detention and printing of petitioner."

Letter from Jesse Berman to Judge Robert L. Carter, February 24, 1976, at p.3.

As articulated by Chief Judge Fuld, the reason the New York Court of Appeals did not reach the merits of Gates' "fruit of the unlawful arrest" argument is that it was not raised below at all:

"[T]he fact is that Gates failed to challenge the admissibility of his fingerprints on the ground that they were the fruit of an unlawful arrest either by pretrial motion to suppress ... or by objection at the trial to their receipt." People v. Gates, supra, 24 N.Y. 2d at 670, 249 N.E. 2d at 452, 301 N.Y.S. at 601.

That conclusion was upheld by two courts on state collateral attack. The opinion written by Chief Judge Fuld is to be understood as holding that counsel's objection, quoted above, was not sufficiently specific to raise the fruit of an unlawful arrest argument that Gates raised for the first time in the New York State Court of Appeals and seeks to pursue here. Such

pursuit, however, is foreclosed. The Court of Appeals was merely enforcing procedural requirements under New York law and chose to follow its policy of ignoring claims judged not to have been adequately raised below.

People v. Friola, 11 N.Y. 2d 157, 182 N.E. 2d 100, 227 N.Y.S. 2d 423 (1962). See also, People v. Bryant, 39 App. Div. 2d 80, 332 N.Y.S. 2d 143, aff'd, 31 N.Y. 2d 744, 290 N.E. 2d 152, 338 N.Y.S. 2d 115 (1972). Had the Court of Appeals chosen to exercise its discretion and remand the case to the trial court for a hearing on the issue of probable cause for the arrest, that issue could have been preserved for purposes of review by this court. ^{3 /} Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 297 n.3 (1967); cf. Morale's v. New York, 396 U.S. 102 (1969). However, it did not take that alternative.

^{3 /} If counsel's objection had been sufficient under state law to raise the issue of taint, and if Judge Silberman's denial was on the merits, the issue would have been preserved for review here, even though failure to raise the question by motion before trial be unexcused. United States ex rel. Scott v. LaVallee, 379 F. Supp. 111, 113-14 (S.D.N.Y. 1974).

Accordingly, the petition must be dismissed.

SO ORDERED.

Dated: New York, New York
May 27, 1976

ROBERT L. CARTER
U.S.D.J.

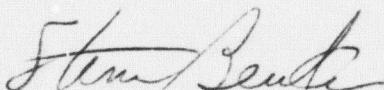
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF New York)

STEVEN BERNSTEIN , being duly sworn, deposes
and says: deponent is not a party to the action, is over
18 years of age and resides at 90 Bedford Street, N.Y., N.Y. 10014
On September 13, 1976 , served the within APPELLANT'S

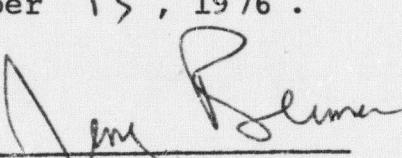
APPENDIX

upon Louis J. Lefkowitz attorney(s)
for Respondent-Appellee in this action, at
Two World Trade Center, New York, N.Y. 10047
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in - ~~postoffice~~ - official
depository under the exclusive care and custody of the
United States Postal Service within the State of New York.



STEVEN BERNSTEIN

Sworn to before me on
September 13, 1976 .


Notary Public
State of New York
Qualified in New York City
Commission Expiration March 30, 1978
Commission Expiration March 30, 1978
Commission Expiration March 30, 1978